Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1761

WAYNE SEAY
Petitioner,

v.

STATE OF NORTH CAROLINA
Respondent.

ON APPLICATION FOR CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF IN OPPOSTION TO CERTIORARI

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I.

OPINION OF THE COURT BELOW

The opinion of the North Carolina Court of Appeals affirming Petitioner's conviction on two counts of embezzlement is reported, *State v. Seay*, 44 N.C. App. 301, 260 S.E. 2d 786 (1979). The North Carolina Supreme Court's dismissal of Petitioner's appeal and dismissal of his petition for discretionary review are reported in 299 N.C. 333, _____ S.E. 2d _____ (1980).

II.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner asserts denial of his rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Also relevant is the Fourth Amendment to the Constitution of the United States and N.C. Gen. Stat. §§15A-701 to - 704. Respondent admits that no statute of North Carolina bars the prosecution of a felony, *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969); N.C. Gen. Stat. §15-1. North Carolina has adopted a "Speedy Trials Act," N.C. Gen. Stat. §§15A-701 to - 704, but that law grants rights which attach upon accusation, *State v. Rice,* 46 N.C. App. 118, _____ S.E. 2d _____ (1980).

III.

QUESTIONS PRESENTED

1. Whether the lapse of time alone, a period of about fifteen months, from the time that prosecuting agencies had reasonable grounds to believe that a criminal offense may have been committed until the Petitioner's indictment, violates his right to a speedy trial when the Petitioner's proof of prejudice fails.

2. Whether the right to a speedy trial is a personal right such that the Petitioner must show prejudice arising from delay in order to secure dismissal of the indictment.

IV.

STATEMENT OF THE CASE

The State relies on the Petitioner's assertion (Petition p. 3) that a copy of the record of the hearing on the motion to dismiss (R pp 1-43 in the North Carolina Court of Appeals) has been filed with the Clerk.

Wayne Seay was secretary-treasurer of American Marketing Company, Inc. and Robert McLawhorn was president of the corporation on April 2, 1973 (R p 13). In his capacity as secretary-treasurer of the corporation Mr. Seay received from Roger Franklin Tise a check from Mr. James Belton made payable to the order of American Marketing Corporation, General Partner, in the amount of four hundred ($400.00) dollars dated April 2, 1973. Furthermore, Mr. Seay received on April 6, 1973 a Northwestern Bank draft in the name of Inez Poindexter for five hundred ($500.00) dollars (R p 15).

Inez Poindexter testified (R p 20) that on April 6, 1973 she made out a check to American Marketing Company. Approximately six months later she talked with Wayne Seay. Subsequently Mrs. Poindexter contacted the Attorney General's office and the Secretary of State. She received a response from the Consumer Protection Division of the Attorney General's Office[1] dated April 8, 1976 and a response from the Securities Deputy of the Secretary of State's

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[1]The Attorney General of North Carolina has established a Consumer protection Division to enforce N.C. Gen. State. §75-1.1, North Carolina's "little FTC Act." There are no criminal sanctions for violation of N.C. Gen. Stat. §75-1.1, see N.C. Gen. State. §75.6.

Office[2] dated September 7, 1976 (R p 21). She was advised by the letter from the Secretary of State's Office to contact her District Attorney. She then talked with District Attorney Tisdale sometime in September of 1976 (R p 21).

Mrs. Poindexter made contact with Mr. Seay over the telephone on several occasions from April of 1973 through April or May of 1974. She was assured by the defendant that the defendant was "working on it and things was going to go and he thought it would be a good thing" (R p 23). Mrs. Poindexter also talked to Mr. Seay after having written to the Attorney General's Office (R p 23). She further testified that throughout this time she had no reason to believe that her money was not invested as Mr. Seay had told her that it was. In 1977 she was contacted by Mr. Daniels of the State Bureau of Investigation (R p 24).

James Belton testified that he had invested on April 2, 1973 through Roger Tise (R p 24). Belton did not make contact with any official concerning his investment until

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[2]Mr. William Coppedge, now retired, was for many years the Deputy Secretary of State who was responsible for enforcing North Carolina's securities laws, such as the "Blue Sky" law, Securities Dealers Registration law, and Tender Offer Act, Chapters 78A and 78B of the North Carolina General Statutes. The Secretary of State has no power to initiate a criminal prosecution.

the fall of 1976 when he wrote the State Bureau of Investigation (R pp 24, 25).[3]

District Attorney Tisdale testified that he saw Mrs. Poindexter on September 15, 1976 at which time she discussed with him the investment that she had made in Salem Properties (R p 26). District Attorney Tisdale attempted to call Mr. Seay and dictated a letter to Mr. Seay on or about that date (R p 28). The letter is quoted at R p 81 as follows:

> "Dear Mr. Seay: I met with Mrs. E. B. Poindexter yesterday in regard to a consumer protection complaint which she had against you and American Marketing Corporation (Salem Properties). It seems that Mrs. Poindexter has received little satisfaction or explanation from you concerning her investment with your company and she raises serious questions which should be answered. This may just be a misunderstanding and a lack of communication. However, I think that I can help in this matter if you would care to make an appointment to see me and discuss this matter. If you do not want to discuss the matter, then I will have no other recourse than turning it over to our investigators to do a thorough study as to whether

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[3]North Carolina's State Bureau of Investigation is a criminal investigative and law enforcement agency, N.C. Gen. Stat. §114-12, to - 14. The Attorney General of North Carolina is the Secretary of the Department of Justice of which the State Bureau of Investigation is a part, N.C. Gen. Stat. §143A-49 et seq. Mr. Daniels is sworn as a law enforcement officer through the State Bureau of Investigation and assigned to the Attorney General's Special Investigations Unit, 12 NCAC 2F .0401 et seq. The State Bureau of Investigation has no "original jurisdiction" to initiate a criminal investigation, subject to a few exceptions, N.C. Gen. Stat. §114-14; 12 NCAC 3 .0204, none of which are applicable in this case.

there should be criminal charges brought. We receive numerous complaints from consumers, many of which are unfounded. However, there are those that do have some merit and fact of which actions have been brought. I would hope that this is just a misunderstanding between the parties, and that it might be resolved."

It was the District Attorney's understanding at the time that he had talked with Mrs. Poindexter that there was a misunderstanding or lack of communications between Mrs. Poindexter and Mr. Seay (R p 26). Following the District Attorney's meeting with Mrs. Poindexter and his sending the letter to Seay, he received a telephone call from Seay (R pp 28-29). Seay assured the District Attorney that he intended to repay Mrs. Poindexter and asked the District Attorney if he would give 30 days in which to do so (R p 29). At that time the District Attorney had referred Mrs. Poindexter to a private attorney.

On April 26, 1977 a meeting was held with the District Attorney, a member of his staff, members of the staff of the Attorney General's Office and Mr. DeGraw, Mrs. Poindexter's attorney, to discuss another white collar type crime investigation involving Wayne Seay and corporations other than American Marketing and Salem Properties (R pp 30-31). As a result of that meeting an attorney with the Attorney General's Office expressed the opinion that "he did not see any obvious criminal violation" (R p 31) at that time. The District Attorney, the only official who could prosecute this violation did not know that the investigation had been completed "until the indictment was signed" (R p 33).

Ernest J. Daniel, Jr. of the State Bureau of Investigation testified that he received certain information concerning Mr. Wayne Seay and Salem Properties at the April 27, 1977 meeting and that he had commenced investigation on October 24, 1977 (R p 35). Intensive investigation did not begin until November 22, 1977 (R p 36). On January 11, 1978 Agent Daniel obtained court orders to the Northwestern Bank and Bank of North Carolina to obtain records of financial transactions. He received this information approximately January 24 (R p 37). The indictments were filed on February 28, 1978 (R pp 4; 9). Orders for arrest were served on the defendant on March 23, 1978 (R pp 7;11).

While Petitioner testified that he did not know where the corporate books and records of American Marketing Corporation and Salem Properties were located because the books and records were taken when the companies were evicted for non-payment of rent from the Wachovia Bank Building, (R p 13), the building manager testified (R pp 40-41) that the only records in the office were promotional brochures.

V.

REASONS WHY THE WRIT SHOULD NOT ISSUE

THE ISSUE WHICH PETITIONER SEEKS TO PRESENT HAS BEEN HERETOFORE DECIDED BY THIS COURT AND THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.
(Supreme Court Rule 19)

The decisions of this Court clearly establish that the Petitioner has received the speedy trial and the due process to which he is entitled in the circumstances of this case. Both in the State appellate proceedings and in his Peitition to this Court the Peititioner has relied on a series of decisions in this Court and one decision of the North Carolina Supreme Court. Analysis of the facts and rationales of these decisions demonstrates, the State contends, that no Federal right of the Peititioner has been abridged and that no sound reason exists to interpret the Fifth, Sixth and Fourteenth Amendments as broadly as Peititioner would desire.

In *United States v. Ewell,* 383 U.S. 116 (1965) this Court held that a lapse of 19 months between arrest on one charge and hearing on indictments based on the same events, where the appellees had secured orders vacating their pleas of guilty to the first warrants, did not violate their right to a speedy trial. The Court recognized that the bulk of the delay was a result of the appellees' successful prosecution of their §2255 motions. The Court reasoned that the interval created the same problems for the Government as for the appelles, as the Government was required to prove guilt beyond a reasonable doubt. The Sixth Amendment requires "orderly expedition and not mere speed," citing *Smith* v. *United States,* 360 U.S. 1, 10 (1959) and does not amount to a deprivation of rights unless "purposeful or oppressive," delay is shown, *Pollard* v. *United States,* 352 U.S. 354, 361 (1957).

United States v. Marion, 404 U.S. 307 (1971) dealt with an interval of three years between the alleged occurrence of the criminal acts and the filing of indictments. No evidence was submitted on the motion

to dismiss; no prejudice was claimed or demonstrated. The District Court dismissed, holding that the Government must have been aware of the relevant facts three years prior to the indictments. This Court reversed, holding that the Sixth Amendment right attaches upon accusation; indictment, in that case being the accusation, see 404 U.S. at 315, note 8.

The Court also addressed the relevance of statutes of limitation, quoting from *United States v. Cadarr,* 197 U.S. 475, 478 (1905): "[a]t the common law, and in the absence of special statutes of limitations, the mere failure to find an indictment will not operate to discharge the accused from the offense nor will a *nolle prosequi* entered by the government, or the failure of the grand jury to indict."

The Court carefully analyzed the evils against which the speedy trial guarantee protects, saying that those evils exist apart from actual or possible prejudice to an accused's defense. The Fifth Amendment would require dismissal if the defendant showed at trial that the pre-indictment delay caused substantial prejudice to the defendant's rights to a fair trial and that the delay was an intentional device to gain a tactical advantage over the accused.

In *Dillingham v. United States,* 423 U.S. 64 (1975) this Court held that a 22 month interval between arrest and indictment followed by a 12 month interval between indictment and trial counted together amounted to denial of a Sixth Amendment right. In short, arrest constitutes an "accusation" within the meaning of the Amendment.

United States v. Lovasco, 431 U.S. 783 (1977) addressed an interval of 18 months between the date on which the offenses of possession of firearms stolen from the United States mails and dealing in firearms without a license were alleged to have occurred and the filing of the indictment. The District Court heard defendant's motion to dismiss, which was grounded on claims that the delay was unnecessary and a claim that his defense had been prejudiced.

This Court analyzed the Due Process claim by saying, 431 U.S. at 790: " . . . proof of prejudice is generally a necessary but not sufficient element of a due process claim, and . . . the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused."

The Court then analyzed at length the reasons that it would be contrary to the best interests of prosecutors, the accused, law enforcement officials, the courts and the interests of public justice to require the Government to file charges promptly upon obtaining sufficient evidence to prove guilt beyond a reasonable doubt. The Court held that to prosecute a defendant following investigative delay does not deprive him of due process, *even if his defense might have been somewhat prejudiced by lapse of time.*

The state case on which Petitioner relies is *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969). In *Johnson* the appellant was tried on an indictment returned at the November 1967 Session of Nash County Superior Court charging that the appellant had committed robbery and aggravated assault on 25 October 1963. The evidence on the motion to dismiss showed that the Sheriff of Nash

County obtained warrants on 1 November 1963 charging Johnson with the offenses alleged in the November 1967 indictments. The Sheriff took the warrants to the adjacent county of Wilson where Johnson was held on unrelated charges. The Sheriff read the warrants to Johnson, but did not serve them or arrest him on them. Johnson never demanded trial on the Nash warrants.

The North Carolina Supreme Court, in what has been called a "pioneering" decision, Note, "The Potential Defendant's Right to a Speedy Trial," 48 N.C.L. Rev. 121 (1969), relying on concepts of due process and speedy trial, held that where there had been an atypical delay in securing a warrant or an indictment and the defendant showed (1) that the prosecution deliberately and unnecessarily caused the delay for the convenience or supposed advantage of the State and (2) that the length of the delay created a reasonable possibility of prejudice, defendant has shown denial of a right to a speedy trial and the prosecution must be dismissed.

There are several points to be made about the *Johnson* decision. It is unclear from the opinion whether the North Carolina Court relied on Article I, §19 (the "law of the land" or due process clause) of the Constitution of North Carolina or on the Sixth and Fourteenth Amendments. The Federal decisions relied upon in *Johnson* (and from which the Petitioner seems to draw particular comfort) were characterized in *United States v. Marion, supra,* at footnote 8 as a "unique line of cases in the District of Columbia Circuit concerning pre-indictment delay in narcotics cases where the Government relies on secret informers and (frequently) on single transactions." This Court said of

those cases, including *Ross v. United States,* 121 U.S. App. D.C. 233, 349 F 2d 210 (1965) that they are based on the court's "purported supervisory jurisdiction." When *Johnson* is read against the background of the decisions of this Court it is most properly understood as an extension of the subsequent decision in *Dillingham v. United States, supra,* as constituting, under North Carolina law, a person against whom a warrant has been issued an "accused" within the meaning of the guarantees. The *Johnson* case is thus broader than the decisions of this Court in its application of the right. Both North Carolina appellate courts have held that this Petitioner has failed to bring himself within the protections of the application or the even yet broader dicta of this North Carolina rule.

Johnson, in connection with the cases decided in this Court, establish the irrelvance of the absence of a statute of limitations on felonies in North Carolina law, see 264 N.C. at 269; see also the four factor test adopted by the North Carolina Court, *State v. Johnson, supra,* followed, *State* v. *McKoy,* 294 N.C. 134, 240 S.E. 2d 383 (1978).

The test to be applied, under the decisions of this Court, then, is whether the Petitioner has shown (1) prejudice and (2) that the delay was an intentional device to gain tactical advantage over him, *United States v. Lovasco, supra; United States v. Marion, supra.*

Petitioner's claim of prejudice, a "necessary but not sufficient," *United States v. Lovasco, supra,* showing, is based on a very thin record. At the pretrial hearing he asserted that he did not know where the books and records of American Marketing and Salem Properties

were located; that they were taken by the landlord when the companies were evicted for non-payment of rent (R p 13). Yet the Peititioner's own witness, Lester R. Burnette, the building manager, testified that the only corporate records found when the managing agent of the office building foreclosed was some promotional brochures (R p 41). Furthermore, Petitioner's only witness, Robert T. McLawhorn, read before the jury a purported letter from Seay to Tise, the salesman, which instructed Tise on the repayment of the investments which he had solicited (R p 88).

Petitioner's defense was that he had repaid the investors (R pp 14-15). The corporate books and records which would have established that defense were the banking records of the companies and the letter which McLawhorn read before the jury. Microfilm copies of the bank records became available to the State on January 24, 1978, after Agent Daniels got a search warrant for them (R p 37). Those same records would have been available to Seay or McLawhorn upon payment of the banks' copying charge. Thus the claim of prejudice is attenuated, at best, and the North Carolina courts had more than ample reason to reject it.

If there is any showing of any delay or lapse of time for the convenience of the State, that lapse of time is from April 27, 1977 to October 24, 1977, a period of less than seven months (R pp 35; 37-38). During the period from October 24, 1977 when "investigation" (R p 35) began, through November 22, 1977 when "intensive investigation" began, through January 11, 1978 when search warrants were obtained (R p 37) through January 24, 1978, when the bank records were received (R p 37) the State had *no* proof that the Petitioner had " . . .

embezzle[d] or fraudulently or knowingly and wilfully misappl[ied] or convert[ed] to his own use any money,. . . check, . . . belonging to any other person . . . " N.C. Gen. Stat. §14-90. Indictments, the first formal "accusation," issued on 27 February 1978 (R pp 4; 7-8) and were served on March 23, 1978 (R pp 7; 11). Trial began April 17, 1979 (R pp 1; 44), after denial of defendant's motion to dismiss, heard on May 31, 1978 (R pp 1; 44). In this case defendant bases none of his claim on post-indictment or post-arrest lapse of time or delay. No information came to the attention of any official of the State who had a legal duty to prosecute or investigate prior to September 15, 1976 (R p 26 and notes 1-3, this Brief) and he had no reason to request further investigation prior to, at the earliest, November 1, 1976 (R p 32). "Intensive investigation" (R p 36) was begun by responsible officials about a year later. The period of September 15, 1976 (the meeting of the District Attorney with the complainant Poindexter) to November 1, 1976 (thirty days after Petitioner promised repayment) is attributable to Petitioner and his false assurances of repayment.

On this record it is apparent that Petitioner would have the Court establish a right expressly rejected in *Hoffa v. United States,* 385 U.S. 293 (1966) where this Court said:

> "There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law

> enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction."

The Petitioner cites no authority whatsoever for the assertion that the State or the Government should be required to prove that the interval between the occurrence of the crime and indictment is not prejudicial. The reasons are obvious: (1) No such authority exists and (2) the whole record here repudiates his claim. At all events, the claimed right is personal c.f., *Gannett v. DePasquale,* 443 U.S. 368 (1979) and the heretofore cited decisions of this Court place the burden on the defendant. So allocating the burden is completely fair because: (1) the claim is in the nature of a plea of confesson and avoidance, *United States v. Marion,* 404 U.S. at 312; (2) the difficulties of proof of a negative are well known to and often discussed by this Court, e.g., *Mullaney v. Wilbur,* 421 U.S. 684 (1975); (3) the facts establishing prejudice are far more likely to be known by the defendant than by the Government or the State; (4) the showing of prejudice is a necessary but not alone sufficient showing in avoidance, *United States v. Lovasco, supra;* and (5) unlike the situation in *Mullaney, supra,* no burden of proof of a negative of a common law element of a substantive crime is fashioned into the defense of a charge; the State retains the full burden of proof of the offense.

The Petitioner's assertions that District Attorney Tisdale lied in his testimony before the jury require only

the answer that the Petitioner may seek indictments for perjury if such is the case. The fact that the District Attorney was the witness will not hamper Petitioner's ability to seek such indictments since North Carolina does not allow the District Attorney to appear before the grand jury in any capacity, N.C. Gen. Stat. §§15A-623 to - 626, and because North Carolina freely allows one claiming to be a victim of crime to employ private prosecution, see Note "Private Prosecution" 50 N.C.L. Rev. 1171 (1972).

Where in a criminal trial the defense elects to offer evidence, rather than relying on the weaknesses of the State's case, it is to be expected that conflicts will arise in some particulars of the evidence.

VI.

CONCLUSION

This record shows that the Petitioner has not shown any convincing claim of prejudice, nor has he shown any significant delay attributable to the convenience, lack of good faith or attempt to gain tactical advantage by the State. He has failed to qualify under a State court created test far more advantageous to him than any ever adopted by this Court. Further review of his trial and conviction are useful only if the Court desires to repudiate *Hoffa v. United States, supra; United States v. Marion, supra;* and *United States v. Lovasco, supra.* The writ should not issue.

Respectfully submitted this the 21st day of July, 1980.

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CERTIFICATE OF SERVICE

I, David S. Crump, Special Deputy Attorney General, North Carolina Department of Justice, do hereby certify that I have this day served three copies of the foregoing Brief in Opposition to Certiorari upon the following by depositing a copy of same in the United States mail, postage prepaid:

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